

Message Text

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ORIGIN EB-07

INFO OCT-01 ARA-06 ISO-00 CAB-02 CIAE-00 COME-00 DODE-00

DOTE-00 INR-07 NSAE-00 FAA-00 PM-03 H-02 L-02 NSC-05

PA-01 PRS-01 SP-02 SS-15 USIA-06 /060 R

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CAB - DLITTON

ARA/EP - FCORRY

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R 062306Z MAR 75

FM SECSTATE WASHDC

TO AMEMBASSY LIMA

INFO AMEMBASSY LA PAZ

AMEMBASSY QUITO

AMEMBASSY BUENOS AIRES

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E.O. 11652: GDS

TAGS: EAIR, PE

SUBJECT: US-PERU CIVAIR DISPUTE

REF: LIMA 1621

1. DEPT ANSWERS TO QUESTIONS RAISED PARA 2 REFTEL ARE AS
FOLLOWS:

(1) POOLING ARRANGEMENTS WOULD BE VIOLATION OF FEDERAL
ANTITRUST LAWS UNLESS IMMUNITY FOR INVOLVED CARRIERS WERE
OBTAINED FROM CAB IN FEDERAL AVIATION ACT (FAA) SECTION 412
APPROVAL OF AN INTERCARRIER AGREEMENT AS IN THE PUBLIC
INTEREST. POOLING ARRANGEMENTS ARE BY THEIR NATURE ANTI-
COMPETITIVE, DISTORT MARKET FORCES AND ACCORDINGLY WOULD
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NORMALLY BE CONSIDERED CONTRARY TO THE PUBLIC INTEREST.

CAB HAS NEVER APPROVED A POOLING AGREEMENT BETWEEN CARRIERS.

(2) OUR BEST JUDGMENT IS THAT AERO PERU CANNOT SUCCESSFULLY DEFEND ITSELF AGAINST SUSPENSION OF PERMIT.

(3) WE SUSPECT AERO PERU BELIEVES IT CAN LINE UP DOMESTIC SUPPORT, BUT WE HAVE NO EVIDENCE OF THIS.

(4 AND 5) CAB ORDER IS NOT PUBLISHED UNTIL AFTER

PRESIDENTIAL ACTION IN ACCORDANCE WITH SECTION 801 OF FAA. THEREFORE, WE DO NOT EXPECT THAT SITUATION REFERRED TO IN QUESTION 4 COULD ARISE. DECISIONS IN SEVERAL CASES IS TO EFFECT THAT A CAB ORDER PRIOR TO PRESIDENTIAL ACTION IS NOT A FINAL DECISION AND FOR THIS REASON AS WELL AS STATUTORY PRECLUSION WOULD BE UNREVIEWABLE. IN ANY EVENT, RE QUESTIONS 4 AND 5, SEC. 1006 OF FAA WOULD PRECLUDE JUDICIAL REVIEW OF AN ORDER AGAINST A FOREIGN AIR CARRIER SUBJECT TO PRESIDENTIAL APPROVAL. SEC. 1006 READS AS FOLLOWS: "ANY ORDER ... ISSUED BY THE BOARD ... UNDER THIS ACT, EXCEPT ANY ORDER IN RESPECT OF ANY FOREIGN AIR CARRIER SUBJECT TO THE APPROVAL OF THE PRESIDENT AS PROVIDED IN SECTION 801 OF THIS ACT, SHALL BE SUBJECT TO REVIEW BY THE COURTS OF APPEAL ..." THE COURTS HAVE APPLIED THIS RESTRICTION VERY STRICTLY WITH RESPECT TO FOREIGN AIR CARRIERS. SEE PAN AMERICAN WORLD AIRLINES VS. CAB, 392 F. 2D 483, 490-95 (1968) AND CASES CITED THEREIN. SAME CASES MAKE CLEAR THAT PRESIDENTIAL APPROVAL UNDER SEC. 801 IS NOT APPEALABLE.

(6) THIS WOULD DEPEND ON WHETHER COURT GRANTS A STAY OF CAB ORDER APPROVED BY PRESIDENT PENDING COURT DECISIONS, WHICH WE REGARD AS UNLIKELY BASED ON NONREVIEWABILITY OF THE ORDER AS DISCUSSED UNDER 4 AND 5.

2. EMBASSY SHOULD BE AWARE THAT WE HAVE NOT HAD A REAL DOGFIGHT IN COURTS WITH A FOREIGN AIR CARRIER OVER TOTAL SUSPENSION IN PAST. THEREFORE, WE WOULD BE PLOWING NEW GROUND AND NOTHING IS CERTAIN WITH INGENIOUS LAWYERS. NEVERTHELESS WE FEEL APPLICABLE LEGISLATIVE PROVISIONS AND

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BODY OF CASE LAW ARE SUFFICIENTLY CLEAR TO MAKE DECISIONS BASED ON ABOVE ANALYSIS WITH SUBSTANTIAL DEGREE OF CERTAINTY OF THEIR ACTUAL EFFECT. INGERSOLL

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